# STATE OF MICHIGAN

# COURT OF APPEALS

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| ANTHONY L. HOSKINS,<br><br>Plaintiff-Appellant, | UNPUBLISHED<br>May 28, 2013 |
| v | No. 309237<br>Oakland Circuit Court |
| RONETTA N. HOSKINS,<br><br>Defendant-Appellee. | LC No. 2010-776355-DM |

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of divorce. We affirm in part and reverse and remand in part.

Plaintiff raises several arguments on appeal challenging the trial court's determination and division of the martial estate, the child support award, and the award of attorney fees to defendant.

> In granting a divorce judgment, the trial court must make findings of fact and dispositional rulings. The trial court's factual findings will not be reversed unless they are clearly erroneous, i.e., if this Court is left with the definite and firm conviction that a mistake has been made. If this Court upholds the trial court's findings of fact, it must then decide whether the dispositional ruling was fair and equitable in light of those facts. The trial court's dispositional ruling is discretionary and will be affirmed unless this Court is left with the firm conviction that it was inequitable. [*Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005) (citations omitted).]

First, plaintiff argues that the trial court incorrectly treated plaintiff's bonuses, stock options, and stock grants as both income and marital property. We disagree. Specifically, plaintiff argues that since the Michigan Child Support Manual Section 2.01 includes bonuses and other monies received from an employer as income, and the trial court treated his bonuses, stock options, and stock grants as income in calculating his child support, they cannot also be treated as marital property. However, plaintiff fails to provide authority to support this argument. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480

(1998). Further, plaintiff's income, for purposes of child support, does not directly include bonuses and stock options and grants already received because it is based on present annual income. The trial court did not add up everything he had received during the marriage to determine his annual income; rather, it determined how much he was expected to continue receiving.

In addition, assets earned during the marriage are considered part of the marital property and are subject to division. MCL 552.19; *Reed*, 265 Mich App at 151-152. MCL 552.19 grants the trial court broad authority to award assets that "have come to either party by reason of the marriage" as it deems "just and reasonable." The division need not be equal; rather, it must be equitable. *Sparks v Sparks*, 440 Mich 141, 159; 485 NW2d 893 (1992). When plaintiff received the bonuses, stock options, and stock grants, they became marital assets, just like any stocks or cash in a bank account. See *Pickering v Pickering*, 268 Mich App 1, 12-13; 706 NW2d 835 (2005); *Reed*, 265 Mich App at 152. Further, the trial court was faced with a dilemma because plaintiff earned several hundred thousand dollars a year, depleted significant marital assets through excessive entertainment spending and large cash withdrawals, and failed to provide sufficiently detailed financial information. When a party in the divorce disposes of or underreports marital assets, this creates a burden on the trial court and the non-earning spouse. See *Sands v Sands*, 442 Mich 30, 33-34; 497 NW2d 493 (1993). Although the trial court essentially divided part of plaintiff's income earned during the marriage, rather than dividing existing assets, the trial court attempted to create a remedy that it believed would be just and reasonable under the circumstances, as it was required to do. See MCL 552.19; *Reed*, 265 Mich App at 152. Plaintiff further argues that some of the stock options and grants should not be considered marital property because although he cashed them during the marriage, they were actually earned before the marriage. However, plaintiff did not provide the trial court with evidence that any specific amount of the distributions received from his employer actually constituted the cashing of stock options or grants that he received before the marriage. Thus, because the trial court cannot speculate, these cashed stock options became commingled marital property. See *Pickering*, 268 Mich App at 13. Therefore, the trial court's division of the bonuses, stock grants, and stock options earned during the marriage was permissible under MCL 552.19, and the trial court did not impermissibly treat them as both income and marital property.

Second, plaintiff argues on appeal that the trial court failed to make findings of value when it awarded defendant one-half of the bonuses, stock options, and stock grants plaintiff received during their marriage. We disagree. In *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003), this Court explained that, before dividing the property, the trial court must make specific findings regarding the value of the property, if the value is in dispute. In other words, if the value of an asset was not at issue, the trial court does not have to determine it; for example, if real estate was to be sold and the proceeds divided equally. *Id.* at 627 n 5. Here, although the trial court did not state the specific dollar value to be awarded, the value was not directly at issue. In addition, plaintiff testified that the bonuses, stock options, and stock grants equaled the difference between his base salary and the distributions reported by his employer. Thus, there was sufficient information for the parties to determine the value of assets awarded to defendant, and the trial court was not required to identify the exact value of the bonuses, stock options, and stock grants awarded.

Third, plaintiff argues that it was error for the trial court to award defendant one-half of pre-tax value of the bonuses, stock options, and stock grants without crediting him for the taxes he paid and the money he used to support his wife and children during the marriage. We disagree. In *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993), this Court held that the trial court does not abuse its discretion by failing to consider tax consequences when dividing property. If there was sufficient evidence presented regarding the tax consequences, the trial court may consider it, but the main issue is whether the division was equitable. *Id.* at 164-165. Here, plaintiff's failure to provide sufficient evidence regarding the net distribution he received and the tax consequences of his decision to cash out his stock options early, impeded the court's ability to determine the exact tax amount.

Fourth, plaintiff argues that it was error for the trial court to award defendant one-half of the bonuses, stock options, and stock grants that plaintiff would earn for two years after the divorce judgment. We agree. This Court has held that "future, speculative bonuses do not fit into either the category of marital assets, or separate assets, because they do not yet exist." *Skelly v Skelly*, 286 Mich App 578, 584; 780 NW2d 368 (2009). Specifically, this Court stated that "[t]hese bonuses were not earned during the marriage and are based solely on the potential occurrence of future events unrelated to the marriage." *Id.* Therefore, the award of future bonuses, stock options, and stock grants must be reversed and this case remanded for reconsideration of the division of assets. The trial court may also wish to reconsider defendant's request for spousal support in light of the court's inability to award a percentage of future speculative income.

Fifth, plaintiff argues that the trial court failed to address the relevant factors for dividing the assets as required by *Sparks*. We disagree. The trial court must consider the following factors and make findings when they are relevant: length of the marriage, contributions of the parties to the marital estate, age and health of the parties, life status of the parties, the parties' necessities and circumstances, earning ability of the parties, past relations and conduct of the parties, and general equity principles. *Sparks*, 440 Mich at 159-160.

In the initial opinion and order, the trial court discussed the facts applicable to each of the *Sparks* factors. In the final opinion and order, after plaintiff moved for reconsideration, the court cited the following factors as relevant: defendant became a stay-at-home mother pursuant to an agreement with plaintiff, defendant had balances on three credit cards that she said were used to purchase items for herself and the children, and defendant claimed plaintiff had extramarital affairs and plaintiff admitted spending money at gentleman's clubs. Plaintiff, however, argues that the trial court seemed to ignore the evidence that the parties lived separate financial lives. Property earned during the marriage is presumed to be marital property, regardless whether the parties started living separately. *Byington v Byington*, 224 Mich App 103, 112; 568 NW2d 141 (1997). However, the intent to maintain separate lives is relevant in dividing the marital estate. *Id.* In this case, it does not appear that the parties intended to maintain separate financial lives during the marriage. Although defendant testified that plaintiff refused to add her name to his account, she used his income to support her and the children. Further, it is unlikely that the parties intended to live a separate financial life when they agreed plaintiff would support the family while defendant was a stay-at-home parent. Accordingly, we find that the trial court made sufficient findings regarding the relevant *Sparks* factors.

Sixth, plaintiff challenges the amount of child support he was ordered to pay, arguing that it was not commensurate with the children's needs, the court should have imputed to defendant a higher income, and the court miscalculated his overnights. We disagree. We review the trial court's factual findings underlying a child support order for clear error, and its discretionary rulings, including the decision to impute income, for an abuse of discretion. *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011). In addition, "[o]rders concerning parenting time must be affirmed on appeal unless the trial court's findings were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering*, 268 Mich App at 5.

Plaintiff argues that there was insufficient evidence that the children's needs required that he pay a total of $4,584.35 per month. The state friend of the court bureau is statutorily required to develop a child support formula based on "the needs of the child and the actual resources of each parent." MCL 552.519(3)(a)(*vi*). The trial court is presumptively required to follow the formula, *Carlson*, 293 Mich App at 205, although the court can deviate from the formula if it would lead to an unjust or inappropriate result. *Burba v Burba*, 461 Mich 637, 645-646; 610 NW2d 873 (2000). Plaintiff appears to be arguing that following the formula led to an unjust and inappropriately high child support amount because his high income resulted in more child support than the children actually needed. Plaintiff cites the holding in *Haefner v Bayman*, 165 Mich App 437, 444-446; 419 NW2d 29 (1988), that the children's needs do not include expenses that the custodial parent would have regardless of the children's presence. However, plaintiff fails to acknowledge that the formula is also required to consider his economic resources. See MCL 552.519(3)(a)(*vi*). This Court has recognized that financial need and a parent's ability to pay is relevant in determining appropriate child support payments. See, e.g., *Haefner*, 165 Mich App at 446; *Vaclav v Vaclav*, 96 Mich App 584, 588; 293 NW2d 613 (1980). Plaintiff fails to distinguish his situation from any other involving a high-income parent. Income disparity does not make the formula unjust or inappropriate; rather, the formula is intended to set child support levels based on the parents' incomes. *Burba*, 461 Mich at 646, 648.

Plaintiff also argues that the trial court and the friend of the court erred in imputing only a $50,000 annual income for defendant. Plaintiff suggests defendant could have earned at least half of the $130,000 she was earning before they decided that she would leave employment to care for their first child. The voluntarily unexercised potential to earn income may be considered in determining child support and the following factors should be considered: prior employment, education, health, the presence of children in the home, the prevailing wage and availability of employment in the area, special skills or training, and the person's ability to earn the imputed income. *Carlson*, 293 Mich App at 205-206. Although defendant had previously earned a six-figure salary, she was not licensed to practice law in this state, she had never been employed in this state, and she did not want a position requiring long hours while parenting young children. The trial court did not abuse its discretion when it adopted the friend of the court recommendation to impute a $50,000 annual income to defendant, a reasonable amount considering defendant's education and work experience, as well as her status as a single parent to two very young children.

Plaintiff further argues that the trial court erred in awarding him 48 overnights a year, rather than 52. Plaintiff only makes this argument in regard to his child support obligation; he does not argue that he is being denied time with his children. At the bench trial, the trial court

stated that it was going to award plaintiff parenting time on alternate weekends from Friday at 7:00 p.m. to Sunday at 5:00 p.m., which plaintiff states is 52 overnights a year. The trial court then referred the case to the friend of the court for guidance regarding an award of child support. In the final divorce judgment, the trial court awarded plaintiff 48 overnights a year based on the friend of the court's recommendation. MCL 722.27a(1) provides

> Parenting time shall be granted in accordance with the best interests of the child. It is presumed to be in the best interests of a child for the child to have a strong relationship with both of his or her parents. Except as otherwise provided in this section, parenting time shall be granted to a parent in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time.

At trial, plaintiff admitted that he had only been seeing his children about once a month and did not claim that defendant was refusing to allow contact, except potentially when he called too late at night. The evidence strongly suggested that plaintiff would sometimes be unable or unwilling to take the children on a particular weekend, and based on his admitted past conduct, he was extremely unlikely to request the children for more than 48 overnights in a year. Therefore, we cannot say that "the trial court's finding were against the great weight of the evidence, the court committed a palpable abuse of discretion, or the court made a clear legal error on a major issue." *Pickering*, 268 Mich App at 5. Accordingly, the trial court did not err when it ordered plaintiff to pay child support of $4,584.35 per month.

Lastly, plaintiff argues that it was error for the trial court to order that he pay $5,000 toward defendant's attorney fees and that he was not given the opportunity to challenge the amount or reasonableness of the attorney fees awarded. We disagree. The decision whether to award attorney fees is reviewed for an abuse of discretion, while the underlying factual findings are reviewed for clear error and any issues of law are reviewed de novo. *Reed*, 265 Mich App at 164.

Attorney fees are not recoverable as of right in a divorce; however, they are awarded when necessary to allow a party to carry on or defend the action. MCL 552.13(1); *Gates v Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). "A party seeking attorney fees must establish both financial need and the ability of the other party to pay." *Ewald v Ewald*, 292 Mich App 706, 724; 810 NW2d 396 (2011). The party must also establish "the amount of the claimed fees and their reasonableness." *Id.* at 725. Further, "[w]hen requested attorney fees are contested, it is incumbent on the trial court to conduct a hearing to determine what services were actually rendered, and the reasonableness of those services." *Reed*, 265 Mich App at 166.

At the conclusion of the bench trial, defendant requested that plaintiff by required to pay $5,000 toward defendant's attorney fees, which the trial court granted. In doing so, the trial court concluded that defendant lacked the financial means to defend the action, but did not make any specific findings of fact. Plaintiff contested the award in his motion for reconsideration, arguing that defendant did not present any evidence regarding the amount of attorney fees she owed, and thus, plaintiff was not given an opportunity to contest the amount or reasonableness of the attorney fees awarded to defendant. However, plaintiff never specifically argued that the amount awarded was unreasonable. In its opinion and order denying plaintiff's motion for

reconsideration, the trial court held that the attorney fees were necessary to enable defendant to defend the action. The trial court stated that if plaintiff chose to contest the amount of the fees, defendant was directed to submit a statement in support of the hourly rate and hours. Subsequently, defendant filed a statement after the divorce judgment was filed, but before this appeal was filed, which indicated that defendant owed $6,817.25 in attorney fees. However, plaintiff never challenged the reasonableness of the fees as directed by the trial court.

Here, although the trial court did not make any specific findings of fact, the record established that defendant lacked the financial resources to pay her attorney fees. Defendant testified that she had no assets, owed credit card debt for normal household expenses, and earned only $900 in the past year because she was attempting to start a business with limited childcare for two young children. The amount of attorney fees she owed was $6,817.25. "[A] party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees." *Myland v Myland*, 290 Mich App 691, 702; 804 NW2d 124 (2010). Moreover, the record established that plaintiff had the ability to pay the fees, as he made a six-figure yearly salary. Additionally, we note that although defendant received a portion of plaintiff's assets as part of the divorce judgment, she is not required to invade those assets that she is to rely on for support to pay her attorney fees. *Gates*, 256 Mich App at 438.

In addition, while the trial court failed to find facts regarding the reasonableness of the fees incurred, defendant did submit a statement of her fees and plaintiff chose not to challenge the amount. Further, plaintiff does not argue that the amount awarded was unreasonable, he only argues that he was not provided an opportunity to challenge the amount. However, as noted, the trial court did provide plaintiff with an opportunity to contest the amount of fees once defendant submitted the statement, and plaintiff failed to do so. Therefore, the trial court did not abuse its discretion in awarding attorney fees to defendant.

Affirmed in part and reversed and remanded in part for proceedings consistent with this opinion. We do not retain jurisdiction.

No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens